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No. 04-1440

IN THE

Supreme Court of the United States

AMERICAN COLLECTIONS ENTERPRISE, INC., PETITIONER

v.

POOJA GOSWAMI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts should ignore conduct that is in violation of specific provisions of the Fair Debt Collection Practices Act and find no violation if the conduct does not rise to a level that the court considers to be "abusive?"

2. Whether courts may look beyond the debt collectors' written communication with the debtor to other evidence in determining whether the language and the written communication constitutes use of a false representation or deceptive means to collect a debt, in violation of 15 U.S.C. § 1692e(10)?

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INTRODUCTION

Not only is there no conflict in the circuits on the questions presented, there is no other reason for this Court to grant a petition for certiorari on the issues presented by the Petitioner. First, the only grounds that the Petitioner cites in support of its argument that there is a conflict among the circuits is what it perceives to be a conflict between the Sixth Circuit's opinion in *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389 (6th Cir. 1998) and the Fifth Circuit's opinion below in *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488 (5th Cir. 2004). *Lewis* involved the question of whether a settlement letter constituted an exception under § 1692c(c) to the prohibition against a debt collector's communication with a debtor after the debtor sends the debt collector a "cease communications" or "cease and desist" letter to the collector. *Goswami* involved the question whether the settlement letter used false representations or deceptive means to collect a debt in violation of 15 U.S.C. § 1692e(10). There was no issue in the Sixth Circuit's opinion in *Lewis* that the settlement letter used false representations or deceptive means in violation of § 1692e(10). Thus, there can be no conflict among the circuits represented by these opinions.

There is no important issue of federal law for this Court to settle and no departure from the usual course of judicial proceedings for this Court to correct. The summary judgment record in the Court of Appeals below clearly showed that the Petitioner's settlement letter used false representations and deceptive means and thus was in violation of § 1692e(10). The letter represented to Goswami:

> Effective immediately and only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty (30%) percent discount off your above balance owed.
>
> This settlement amount must be in one payment and must be received in our office no later than 30 days from the date of this letter unless you contact our office to make other arrangements.

(See Appendix A). Despite the representation that Petitioner's client would only agree to settle during the next 30 days at a 30% discount, the summary judgment evidence showed that Petitioner had its client's approval to settle at any time at a 50% discount. The letter used false representations and was deceptive.

Petitioner's warning that the Court of Appeals' ruling in *Goswami* will end the ability of all collection agencies and attorneys to negotiate settlements of consumer debts is absurd. The only effect that the Court of Appeals' opinion will have is to stop debt collectors from making false representations in connection with settlement communications. If collectors wish to make a 30% settlement offer instead of a 50% settlement offer, they will still be able to do so. The only thing that they will not be able to do is to affirmatively misrepresent the extent of their authority or falsely represent the time within which a settlement offer must be accepted.

REASONS FOR DENYING THE PETITION

This Court should deny Petitioner's petition for writ of certiorari. First, the decision below does not conflict with the decision of this Court or any court of appeals. The opinion of the Court of Appeals below does not in any way depart from the accepted and usual course of statutory construction. The Court of Appeals did not need to construe § 1692e(10). It applied the summary judgment evidence to the statute and reached a result that was not absurd and not unreasonable. Finally, the Court of Appeals did not decide any important question of federal law that needs to be settled by this Court. The Court of Appeals looked at the summary judgment evidence and found that the collection letter contained false representations in violation of § 1692e(10). This is not an important issue of federal law that needs to be settled by this Court.

I. There is No Conflict Between the Circuit Courts of Appeals on the Questions Presented.

First and foremost, there cannot be a conflict between the Fifth and Sixth Circuits on the questions presented, because the Sixth Circuit case cited by Petitioner, *Lewis v. ACB Business Services, Inc*, 135 F.3d 389 (6th Cir. 1998) was decided under § 1692c(c)(2) and not under § 1692e(10). Nevertheless, the Petitioner asserts that the Sixth Circuit Court of Appeals' opinion in *Lewis* differs from the Court of Appeals' opinion below in three basic ways: (1) *Lewis* holds that any section of the FDCPA that would prohibit non-coercive settlement offers would be in direct variance with the FDCPA's purpose and the Court of Appeals below

applied § 1692e(10) to prohibit a non-coercive settlement letter; (2) *Lewis* holds that a court cannot consider a collection contract in determining whether a communication by a debt collector constituted a violation of the FDCPA and the Court of Appeals below considered Petitioner's collection contract; and (3) *Lewis* holds that a court must look only at the written collection communication involved in determining whether its language violates a provision of the FDCPA and the Court of Appeals below looked at other evidence besides the collection letter. Petition is wrong on each of its assertions.

A. *Lewis v. ACB Collection Services, Inc.* Does Not Hold That a Non-coercive Settlement Letter Cannot Violate the FDCPA.

The Petitioner grossly misstates the holding in *Lewis*. Nowhere in *Lewis* did the Sixth Circuit hold that the language of a settlement letter could not violate the FDCPA. The court in *Lewis* held only that the settlement letter fell within the "notice of remedy" exception of § 1692c(c)(2). In *Lewis*, the debt collector had received a letter from the debtor instructing it to cease all communications. *Lewis*, 135 F.3d at 395. Under the provisions of § 1692c, a debt collector must cease all communication with the debtor after receiving such a written communication, except that the debt collector may send the debtor a notice informing her that the debt collector or creditor may invoke special remedies that are ordinarily invoked. 15 U.S.C. § 1692c(c)(2). The Court held that the settlement letter that the debt collector sent to the debtor constituted such a "notice of remedy" under § 1692c(c)(2) and was

therefore not a forbidden communication following a cease and desist letter. *Lewis*, 135 F.3d at 398. There is no conflict between the decisions of the Court of Appeals below and the Sixth Circuit.

B. *Lewis v. ABC Collection Services, Inc.* Does Not Hold That a Collection Contract is Not Relevant to Whether a Collection Letter Contains False Representations.

Lewis does not stand for the proposition that the debt collector's contract with its creditor/client could not be considered in determining whether representations in a collection letter were false or deceptive. The Sixth Circuit's discussion of collection contracts in *Lewis* was limited to reviewing the district court's decision to deny a motion to compel production of a collection contract in discovery. The Sixth Circuit affirmed the trial court agreeing that the collection contract was not relevant to any of the issues being litigated in that case. In *Lewis*, there were no contentions that the settlement letter at issue involved false representations or deceptive statements of any kind, as there were in this case below. Thus, there is no conflict between the decisions of the Court of Appeals below and the Sixth Circuit.

C. *Lewis v. ABC Collection Services, Inc.* Does Not Hold That Courts Must Look at Collection Letter Only to Determine if its Representations are False.

Lewis does not stand for the proposition that a court must look only at the four corners of the collection letter itself to determine if that letter contains false representations or deceptive means within it. In fact, in the part of the opinion in *Lewis* that actually dealt with § 1692e(10), the Court specifically looked to evidence outside of the collection letter itself. In *Lewis*, the debtor claimed that ACB's use of the alias name "M. Hall" at the bottom of its letter was a false representation and a deceptive means of collecting the debt. 135 F.3d at 400. The court discussed the evidence of ACB's actual collection practices related to use of an alias name on the letter under § 1692e(10) and concluded "it is clear from the record that Lewis's account actually received personal attention, and that the letter was in no other respect deceptive." *Lewis*, 135 F.3d at 401.

A court cannot determine whether the language of a collection letter contains false representations or deceptive means unless the court is able to compare the representations in the letter to the collector's authority, acts or practices. The case at hand is a perfect example of this. There is simply no way to determine whether or not the Petitioner's statements in the settlement letter are true or false without looking at the summary judgment evidence of what the Petitioner's settlement authority was. This is exactly what the Court of Appeals below did. The summary judgment evidence

showed that (a) Petitioner had pre-approved authority from its creditor to offer settlement of the debt at 50% of the face amount of the debt and (b) Petitioner could offer this settlement rate at any time that Petitioner had the account for collection.

There is no conflict between the Sixth Circuit and the Fifth Circuit Court of Appeals' opinions, and this Court should deny the Petitioner's petition for the writ of certiorari.

II. The Court of Appeals Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

The Court of Appeals did not depart from the accepted and usual course of judicial proceedings and there is no need for this Court to exercise its supervisory powers. The Court of Appeals below merely held that the language in Petitioner's collection letter contained false representations and deceptive means as a matter of law under § 1692e(10). The summary judgment evidence in the record clearly showed that this was the case. There is no reason for this Court to exercise jurisdiction, because the Court of Appeals below acted properly.

A. The Court of Appeals' Application of § 1692e(10) Did Not Lead to Absurd or Unreasonable Result, and Looking to the FDCPA's "Purpose" Was Not Necessary.

The Petitioner claims that the rules of statutory construction set out in *United States v. American Trucking Associations*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940), required the Court of Appeals to follow the "purpose" of § 1692e(10) rather than the literal words of that section, where application of that statute produced an unreasonable result plainly at variance with the policy of the legislation as a whole. Petitioner contends that the policy of the FDCPA as a whole is to stop abusive debt collection practices. Petitioner further contends that the Court of Appeals' determination that its settlement letter violated § 1692e(10) was an absurd result or at least was an unreasonable result that was plainly at variance with the policy of stopping abusive debt collection practices. Petitioner therefore asserts that the Court of Appeals should have followed the "purpose" of the FDCPA rather than following the literal words of § 1692e(10).

Petitioner's argument is an absurd one. The Court of Appeals' adherence to the words of § 1692e(10) did not create an absurd or futile result and did not create an unreasonable result at variance with the policy of the FDCPA. The settlement letter contained false representations about Petitioner's settlement authority. The Court of Appeals' application of § 1692e(10) did not create an absurd result, and so it did not need to "look to the purpose" of that section.

B. Prohibiting False Representations in Settlement Letters is Consistent With the Purposes of the FDCPA.

False representations in collection communications is one type of abusive practice that Congress intended to stop by including § 1692e(10) in the FDCPA. The Sixth Circuit in *Lewis* recognized this in stating:

> Congress intended the Act to eliminate unfair debt-collection practices, such as late-night telephone calls, **false representations,** and embarrassing communications.

Lewis v. ACB Business Services, Inc., 135 F.3d 389, 398 (6th Cir. 1998)(emphasis added). The Sixth Circuit in Lewis specifically recognized section 1692e(10) as prohibiting false representations.

> **The FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e.** Section 1692e is broken into sixteen subsections, which provide a non-exhaustive list of prohibited practices. **Subsection 1692e(10), at issue in this case, specifically prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt** or to obtain information concerning a consumer."

Lewis v. ACB Business Services, Inc., 135 F.3d 389, 400 (6th Cir. 1998)(emphasis added). Had the Court of Appeals below addressed the "purpose" of § 1692e(10), it would have found its application of § 1692e(10) to the Petitioner's settlement letter fit within the purpose of that section – to prohibit false, deceptive, or misleading representations in connection with collection of the debt.

C. *Presley v. Capital Credit Collection Services, Inc. and Lewis v. ABC Collection Services, Inc.* Do Not Hold That Only "Very Abusive" Conduct is Actionable.

The Petitioner urges this Court to adopt a new rule that would lead to a new and frightening era of judicial legislation under the FDCPA. Petitioner asks this Court to rule that violations of the express language of provisions of the FDCPA are not violations unless they are "very bad", or "very abusive." Such an approach would completely negate all of the language of the FDCPA and invite the district courts and the courts of appeals to judicially legislate what they believe to be violations based on what they perceive to be "very abusive."

Petitioner asserts that both the Sixth Circuit's decision in *Lewis* and the Ninth Circuit's decision in *Pressley v. Capital Credit & Collection Services, Inc.* 760 F.2d 922 (9th Cir. 1985) support this argument. Petitioner argues that in *Pressley* the Ninth Circuit held that conduct that violates the letter of the law but not the spirit of the law is not actionable as a violation. This completely mischaracterizes the Ninth Circuit's

holding in *Pressley*. The Ninth Circuit held that a second notice letter sent by a debt collector that did not contain the "Mini-Miranda" was not a "communication" within which the disclosure required by § 1692e(11) must be made. *Pressley v. Capital Credit & Collection Services, Inc.*, 760 F.2d at 925.

Similarly, Petitioner asserts that *Lewis* stands for the proposition that collection conduct must violate the spirit of the FDCPA to constitute a violation. This is a complete mischaracterization of the Court's holding in *Lewis*. The court in *Lewis* did not find a "technical violation" that it ignored as not abusive. Rather, it found that the debt collector's letter at issue did not violate the FDCPA because it constituted a "notice of remedy" under § 1692c(c)(2). *Lewis*, 135 F.3d at 399.

The Court of Appeals below did not depart from the accepted and usual course of judicial proceedings. The Court of Appeals found that the Petitioner's settlement letter contained false representations and that it was a deceptive means of collecting a debt. This was not an absurd result or even an unreasonable one and thus the Court of Appeals did not need to look to the "purpose of the Act." Had the Court of Appeals looked at the "purpose of the Act," it would have found its decision fit squarely within the purpose of § 1692e(10). There is no reason for this Court to use its supervisory powers, because the Court of Appeals below acted properly. This Court should deny the Petitioner's petition for the writ of certiorari.

III. The Petition Should be Denied Because There is No Important Question of Federal Law to Be Settled by This Court.

Petitioner argues that the Court of Appeals' decision below will stop collection agencies and consumer collection attorneys from negotiating settlements of consumer debts. This grossly misstates both the Court of Appeals' decision below and the effect that the decision will have.

The Court of Appeals below did not in any way hold that a debt collector may not make a settlement offer or negotiate settlement of a consumer debt and its holding will not have that effect. The Court of Appeals below held only that Petitioner made false representations and used deceptive means in its settlement letter which violated § 1692e(10). More particularly, the Court of Appeals found that where Petitioner stated to the debtor in its settlement letter that the creditor would allow it to offer a discount of only 30% "only for the next thirty days," and where that representation was clearly false because the creditor had already authorized Petitioner to settle for up to a 50% discount at any time, the language clearly constituted use of false representations and deceptive means to collect a debt. The Court of Appeals' decision in no way prohibits a debt collector from negotiating a settlement. Under the Court of Appeals' decision, a collector may extend a settlement offer at a discount and may set a time limit for the debtor to accept the offer. The Court of Appeals' decision only prohibits a debt collector from using false representations and deceptive means in negotiating its settlement, such as

misrepresenting that the discount and time for acceptance are all that the creditor client will accept.

The Petitioner makes a rather frightening argument that somehow if courts do not ignore what it calls "technical" violations, and prohibit only the really big violations or "very abusive" violations of the FDCPA, the result will be vexatious litigation that will "improperly expand" the purpose of the FDCPA to include activity that does not "improperly threaten, abuse or cause harm." First, it is abusive for a debt collector to make false representations in collecting a debt. Second, in § 1692k Congress has provided for awards of attorney's fees and costs to allow debtors to serve as private attorneys general in policing the collection conduct of debt collectors. Litigation brought by individual debtors to address conduct by debt collectors in violation of the express language of particular provisions of the FDCPA is not vexatious; it is what Congress intended and encouraged.

To argue that the courts should look past violations of the FDCPA's express provisions and recognize as violations only conduct that the courts find "very abusive" is to invite judicial legislation of the worst kind.

The Court of Appeals applied the law to the facts and found a violation of § 1692e(10). There is no important federal question for this Court to settle, and this Court should deny the Petitioner's petition for the writ of certiorari.

CONCLUSION

This Court should deny the Petitioner's petition for the writ of certiorari in the petition.

Respectfully submitted,

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PRIORITY LETTER

PO Box 30095
Alexandria VA 22310
ADDRESS SERVICE REQUESTED

01/25/02

RE: 3002 – Capital One
Reference #: 4121741413607826
Total: $933.37

06-D264144-1-002365
Pooja Goswami
5126 Smokey River Dr
Katy, TX 77449-6017

American Collections Enterprise, Inc.
PO Box 30096
Alexandria, VA 22310-8096

***

Dear Pooja Goswami

SETTLEMENT OFFER & AMNESTY PERIOD

We are sending this letter in an attempt to clear you long and overdue account. Effectively immediately, and only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty percent (30%) discount off your above balance owed.

This settlement amount must be in one payment and must be received in our office no later than 30 days

from the date of this letter unless you contact our office to make other arrangements.

Upon receipt of your approved settlement amount, our client will notify the major credit reporting bureaus that your account has been settled. Restoring credit is always a benefit to you and your creditors.

If for some reason you are not able to settle at this time, please contact our office immediately and we will discuss other reasonable payment arrangements for the full balance owed.

For your convenience, we can accept your check by phone or you may pay by Mastercard Visa, American Express or Western Union Quick Collect. ACEI will add a $25.00 check fee to all returned checks as permitted under Virginia law.

Sincerely
Tracy Jones – Ext 116
800-208-2234

This is an attempt by a debt collector to collect a debt. Any information obtained may be used for that purpose.

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